

Aug 27, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES A. C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-CV-00417-SMJ

**ORDER RULING ON MOTIONS  
FOR SUMMARY JUDGMENT**

Plaintiff James A. C. appeals the Administrative Law Judge's (ALJ) denial of his application for Social Security Disability (SSD) benefits and Supplemental Security Income (SSI) benefits. ECF No. 1 at 2. He also challenges the Appeal Council's denial of review. *Id.* He contends both decisions were not supported by substantial evidence. *Id.* Defendant Commissioner of the Social Security Administration (Commissioner) asks the Court to affirm the ALJ's decision. ECF No. 8 at 3.

Before the Court, without oral argument, are the parties' cross-motions for summary judgment. ECF Nos. 12, 13. Upon reviewing the administrative record, the parties' briefs, and the relevant authority, the Court is fully informed. For the

1 reasons set forth below, the Court concludes that although the ALJ properly  
2 weighed Plaintiff's subjective symptom testimony, he erred by not properly  
3 weighing all the medical opinions and vocational expert testimony. Accordingly,  
4 the Court denies the Commissioner's motion, and grants Plaintiff's motion. The  
5 Court reverses and remands for further proceedings.

### 6 **I. BACKGROUND<sup>1</sup>**

7 Plaintiff filed an application for SSD and SSI on May 9, 2014, alleging  
8 disability beginning June 1, 2012.<sup>2</sup> Administrative Record<sup>3</sup> (AR) 22. His claim  
9 was denied initially and upon reconsideration, and Plaintiff filed a written request  
10 for a hearing. *Id.* A hearing was held in Wenatchee, Washington before ALJ Mark  
11 Kim on July 28, 2016. *Id.* The ALJ issued an unfavorable decision on September  
12 22, 2016. The Appeals Council denied Plaintiff's request for review, which made  
13 the ALJ's decision the final decision of the Commissioner subject to judicial  
14 review pursuant to 42 U.S.C. § 405(g). Plaintiff timely appealed to this Court.  
15 ECF No. 1.

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17 <sup>1</sup> The facts are only briefly summarized. Detailed facts are contained in the  
administrative hearing transcript, the ALJ's decision, and the parties' briefs.

18 <sup>2</sup> Plaintiff, through his representative, amended his alleged disability onset date to  
June 9, 2014. AR 22. Nonetheless, the ALJ examined Plaintiff's alleged disability  
19 onset date as June 1, 2012. *See id.*

20 <sup>3</sup> The Administrative Record is filed at ECF No. 9. The Court refers to the record  
using the provided page numbers to avoid confusion and to maintain consistency  
with the parties' briefs.

## II. STANDARD OF REVIEW

The Court must uphold an ALJ's determination that a claimant is not disabled if the ALJ applied the proper legal standards (i.e., free of legal error) and there is substantial evidence in the record as a whole to support the decision. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531 (9th Cir. 1985)); 42 U.S.C. § 405(g). "Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). This must be more than a mere scintilla, but may be less than a preponderance. *Id.* at 1110–11. Even where the evidence supports more than one rational interpretation, the Court must uphold an ALJ's decision if it is supported by inferences reasonably drawn from the record. *Id.*; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

## III. ALJ FINDINGS<sup>4</sup>

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since June 1, 2012, the alleged onset date. AR 24.

At step two, the ALJ concluded that Plaintiff had a medically determinable impairment that was "severe," or a combination of impairments that were "severe."

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<sup>4</sup> The applicable five-step disability determination process is set forth in the ALJ's decision and the Court presumes the parties are well acquainted with that standard. Accordingly, the Court does not restate the five-step process in this Order.

1 *Id.*; *see* 20 C.F.R. §§ 404.1520(c), 416.920(c). Specifically, the ALJ found the  
2 following severe impairments: degenerative disc disease of the lumbar spine, right  
3 clavicle (shoulder) malunion, alcoholic liver disease, alcohol dependence, anxiety  
4 disorder, and mild neurocognitive disorder. AR 24.

5 At step three, the ALJ found that Plaintiff did not have an impairment or  
6 combination of impairments that met or medically equaled the severity of a listed  
7 impairment. *Id.* 25.

8 At step four, the ALJ found that Plaintiff had the residual functional capacity  
9 to perform light work as defined in 20 C.F.R. 416.967(b). *Id.* 27. The ALJ imposed  
10 the following limitations:

11 [Plaintiff] can only occasionally perform push and pull operations with  
12 the right dominant hand. He can never crawl or climb ladders, ropes,  
13 or scaffolds but can occasionally stoop, crouch, and climb ramps and  
14 flights of stairs. He can only occasionally reach overhead with the right  
15 dominant extremity. He should avoid all exposure to extreme cold as  
16 well as excessive noise, dangerous moving machinery, and  
17 unprotected heights. He would be limited to simple routine tasks with  
18 only occasional changes in the work setting.

19 *Id.*

20 In doing so, the ALJ “considered all symptoms and the extent to which these  
symptoms can reasonably be accepted as consistent with the objective medical  
experience and other evidence.” *Id.* The ALJ also considered opinion evidence. *Id.*

At step five, the ALJ found there are jobs existing in significant numbers in  
the national economy that Plaintiff can perform considering his residual functional

1 capacity, age, education, and work experience. *Id.* 33–34. As such, the ALJ found  
2 that Plaintiff was not disabled. *Id.* 34.

#### 3 **IV. ANALYSIS**

4 In her summary judgment motion, the Commissioner argues that the ALJ  
5 appropriately examined: (1) Plaintiff’s subjective symptom testimony, (2) the  
6 medical opinion evidence, and (3) the vocational expert testimony. ECF No. 13.  
7 And, the Commissioner argues, the ALJ’s findings are supported by substantial  
8 evidence and are free of legal error. *Id.* Plaintiff, on the other hand, contests that  
9 the ALJ appropriately examined all three. ECF No. 12.

##### 10 **A. The ALJ properly considered Plaintiff’s Subjective Symptom** 11 **Testimony.**

12 Commissioner argues that the ALJ appropriately considered Plaintiff’s  
13 subjective symptom testimony before rejecting it as inconsistent with the record.  
14 ECF No. 13 at 3–5. Plaintiff argues that the ALJ improperly rejected his  
15 subjective complaints without providing clear and convincing reasons. ECF No.  
16 12 at 15–18. The Commissioner is correct.

17 Because pain can impose significant limitations on a claimant’s ability to  
18 engage in gainful activity, subjective pain testimony is an important factor in the  
19 disability determination process. *See Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th  
20 Cir. 1986). An ALJ is not required to believe pain testimony and may disregard it

1 if there are no objective medical findings that could reasonably be expected to  
2 cause some pain. *Dodrill v. Shalala*, 12 F.3d 915, 917 (9th Cir. 1993).

3 On the other hand, if medical evidence indicates an objective basis for pain  
4 and related symptoms (i.e., association with a clinically demonstrated  
5 impairment), and no evidence suggests the claimant was malingering, then the  
6 reasons for rejecting the claimant's subjective testimony must be "clear and  
7 convincing." *Swenson v. Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989); *see Varney*  
8 *v. Sec'y of Health & Human Servs.*, 846 F.2d 581, 584 (9th Cir. 1988), *rev'd on*  
9 *other grounds upon reh'g*, 859 F.2d 1396 (9th Cir. 1988). And, the ALJ must  
10 justify his decision with specific findings. *Fair v. Bowen*, 885 F.2d 597, 602 (9th  
11 Cir. 1989). This applies even if the claimant testifies that the pain experienced is  
12 greater than what the impairment would be expected to produce (i.e., "excess pain  
13 testimony"): the ALJ, in disbelieving or disregarding that testimony, must still  
14 justify his decision with specific findings. *Varney*, 846 F.2d at 584.

15 Here, the ALJ found that Plaintiff's "medically determinable impairments  
16 could reasonably be expected to cause the alleged symptoms; however, the  
17 claimant's statements concerning the intensity, persistence, and limiting effects of  
18 these symptoms are not entirely consistent with the medical evidence." AR 27–28.  
19 In other words, the ALJ found that there *was* an objective basis for pain and  
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1 related symptoms. The ALJ also seemed to suggest that Plaintiff's testimony  
2 consisted of "excess pain testimony."

3 The main issue is whether the ALJ further justified his decision with  
4 specific findings. Plaintiff argues that the ALJ failed to identify what other  
5 testimony was credible and what was not, and how that undermined Plaintiff's  
6 own credibility. *See Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599  
7 (9th Cir. 1999). To the contrary, the Court concludes that the ALJ properly  
8 articulated why he gave credit to testimony where due, and rejected it otherwise.

9 For example, the ALJ noted that "there has been no indication the  
10 claimant's hernia and back pain complaint history causes any further reduction in  
11 his residual functional capacity than already accommodated by a light level  
12 capacity." AR 29. In another example, the ALJ noted that for claimant's reports of  
13 hearing loss, testing did in fact suggest some hearing loss, and therefore, the ALJ  
14 included a limitation for noise exposure. *Id.* The ALJ also pointed to the lack of  
15 evidence indicating that Plaintiff would be unable to perform even light work,  
16 given his apparent ability to engage in certain activities such as yard work and  
17 rafting. *Id.* 28–29.

18 Therefore, the record reveals the ALJ made specific findings that effected  
19 findings of limitations for work-related activities. Accordingly, the ALJ did not  
20 err.

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3 **B. The ALJ did not properly weigh all the medical opinion evidence.**

4 The Commissioner argues that the administrative decision appropriately  
5 addressed medical source evidence. ECF No. 13 at 5. Plaintiff argues that the ALJ  
6 failed to adequately consider the opinions of Plaintiff’s treating medical providers  
7 (1) John Arnold, Ph.D., an examining psychologist, and (2) Phylicia Hancock-  
8 Lewis, Advanced Practice Registered Nurse (ARNP), as contained in the medical  
9 records. ECF No. 14 at 5–9. The ALJ accorded “no particular weight” to Dr.  
10 Arnold’s assessment, AR 32, and accorded “little weight” to Nurse Hancock-  
11 Lewis’ opinion, AR 31.

12 There are three types of physicians: “(1) those who treat the claimant  
13 (treating physicians); (2) those who examine but do not treat the claimant  
14 (examining physicians); and (3) those who neither examine nor treat the claimant  
15 [but who review the claimant’s file] (non-examining physicians).” *Holohan v.*  
16 *Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001).

17 Generally, a treating physician’s opinion carries more weight than an  
18 examining physician’s, and an examining physician’s opinion carries more weight  
19 than a nonexamining physician’s. *Id.* at 1202. “In addition, the regulations give  
20 more weight to opinions that are explained than to those that are not, and to the



1 opinions of specialists concerning matters relating to their specialty over that of  
2 nonspecialists.” *Id.*

3 If a treating or examining physician’s opinion is uncontradicted, the ALJ  
4 may reject it only by offering “clear and convincing reasons that are supported by  
5 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
6 On the other hand, “[i]f a treating or examining doctor’s opinion is contradicted  
7 by another doctor’s opinion, an ALJ may only reject it by providing specific and  
8 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at  
9 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995)).

10 However, “the ALJ need not accept the opinion of any physician, including  
11 a treating physician, if that opinion is brief, conclusory and inadequately  
12 supported by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d  
13 1219, 1228 (9th Cir. 2009) (citation and alteration omitted).

#### 14 **1. Dr. Arnold**

15 On April 23, 2013, Dr. Arnold opined through checkbox form that Plaintiff  
16 had marked limitations in his ability to “perform activities within a schedule,  
17 maintain regular attendance, and be punctual within customary tolerances without  
18 special supervision;” “adapt to changes in a routine work setting;” and “complete  
19 a normal workday and workweek without interruptions from psychologically  
20 based symptoms.” AR 302.

1 The ALJ gave Dr. Arnold’s assessment of limitations “no particular weight”  
2 because “it was over a year prior to the claimant’s amended onset date and  
3 contained very little information.” AR 32.

4 **a. Opinion predating the alleged onset of disability.**

5 In an unpublished opinion, the Ninth Circuit noted the tension between its  
6 case law, acknowledging that while “medical opinions that predate the alleged  
7 onset of disability are of limited relevance,” the Social Security Administrations’  
8 regulations require the ALJ to “consider all medical opinion evidence.” *Williams*  
9 *v. Astrue*, 493 F. App’x. 866 (9th Cir. 2012) (quoting *Carmickle v. Comm’r of*  
10 *Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008), and *Tommasetti v. Astrue*,  
11 533 F.3d 1035, 1041 (9th Cir. 2008)).

12 On review of the relevant case law in this and other circuits, the Court is  
13 persuaded that an ALJ may not reject medical evidence solely because it predates  
14 the alleged date of the onset of disability. *See, e.g., McQueen v. Colvin*, No. 3:15-  
15 cv-05893 JRC, 2016 WL 4009850 (W.D. Wash. July 27, 2016) (surveying  
16 relevant case law). Nonetheless in some cases, the time elapsed between the  
17 medical opinion and the onset may be sufficient to discount its relevance.

18 But where, as here, the time elapsed is a little over a year, the ALJ must  
19 provide an adequate basis for rejecting the opinion, other than the fact of elapsed  
20

1 time itself. Otherwise, the ALJ commits legal error. Here, the ALJ also explained  
2 that the opinion contained very little information.

3 **b. Opinion containing very little information.**

4 Indeed, an ALJ need not accept the opinion of any physician, including a  
5 treating physician, if that opinion is conclusory and inadequately supported by  
6 clinical findings. *See Bray*, 554 F.3d at 1228. Here, Dr. Arnold marked in  
7 checkbox form certain limitations in Plaintiff's ability to engage in activities. AR  
8 302. While the fact that a checkbox form was used may be insufficient to reject a  
9 treating physician's opinion, Dr. Arnold did not elaborate, cite to Plaintiff's  
10 medical record, or detail any clinical findings. As such, the ALJ did not err in  
11 according no particular weight to Dr. Arnold's opinion.

12 In any case, the Court agrees with the Commissioner that the ALJ decided  
13 what weight to accord Dr. Arnold's opinion by looking at the record as a whole.  
14 *See ECF No. 13 at 5.* An ALJ may discredit a treating physician's opinion that is  
15 unsupported by the record as a whole or by objective medical findings. *Batson v.*  
16 *Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). Dr. Arnold's  
17 opinion is contradicted by other medical sources, including examining  
18 psychologist Dr. MacLennan and hearing medical expert Ellen Rozenfeld, Ph.D.  
19 AR 27–32. And, by according Dr. Arnold's assessment no particular weight, the  
20 ALJ instead accorded the rest of the medical sources more weight based on

1 specific and legitimate reasons supported by substantial evidence. *See Bayliss*, 427  
2 F.3d at 1216.

3 Specifically, Dr. MacLennan “had the opportunity to examine the claimant  
4 in person and her assessment comports with her examination findings.” AR 32.  
5 And Ellen Rosenfeld “had the entire record for review and her assessment is  
6 supported by claimant’s overall medical record, which fails to support a finding of  
7 any significant functional limitations despite his diagnoses.” *Id.* As such, the ALJ  
8 properly weighed Dr. Arnold’s medical opinion evidence.

9 **2. Hancock-Lewis, ARNP**

10 The ALJ did not do the same for Nurse Hancock-Lewis’ opinion. On  
11 October 29, 2015, Nurse Hancock-Lewis opined that Plaintiff was limited to two  
12 hours of standing and walking in an eight-hour work day, and that he should not  
13 lift more than twenty pounds on a consistent basis. AR 386–87. Nurse Hancock-  
14 Lewis also opined that it would be extremely difficult for Plaintiff to maintain  
15 concentration, persistence, and pace in the work place, and that without constant  
16 and vigilant supervision and reminders, Plaintiff’s memory problems would make  
17 him completely unemployable. *Id.* 387.

18 The ALJ assigned “little weight” to Nurse Hancock-Lewis’ opinion because  
19 “although she had somewhat of a treating relationship with the claimant, her  
20 treatment notes with the claimant repeatedly indicated that the claimant’s x-rays

1 showed only minimal degeneration and the claimant otherwise only presented for  
2 treatment on a very limited and isolated basis.” *Id.* 31. Indeed, Nurse Hancock-  
3 Lewis’ x-ray records indicate “early,” “mild,” and “minor” degenerative changes.  
4 *Id.* 367–70.

5 However, regardless of how often Plaintiff presented for treatment with  
6 Nurse Hancock-Lewis,<sup>5</sup> he sought treatment and monitoring for conditions other  
7 than his lumbar and abdominal region, such as memory loss. While Plaintiff  
8 alleged disability due to back and abdominal hernia, he also claimed disability for  
9 memory loss. *Id.* 220. By assigning Nurse Hancock-Lewis’ opinion little weight  
10 based on the internal inconsistency with the x-ray results, which did not capture  
11 Plaintiff’s memory loss, the ALJ failed to consider the medical record as a whole.  
12 Thus, his decision was incomplete and not supported by substantial evidence.

13 **a. The ALJ’s error was not harmless.**

14 Moreover, the ALJ’s error was not harmless. Harmless error analysis  
15 applies to Social Security disability cases. *Marsh v. Colvin*, 792 F.3d 1170, 1172  
16 (9th Cir. 2015); *Molina*, 674 F.3d at 1115. “The nature of that application is fact-  
17 intensive—‘no presumptions operate’ and ‘[the reviewing court] must analyze  
18 harmlessness in light of the circumstances of the case.’” *Marsh*, 792 F.3d at 1172

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20 <sup>5</sup> This articulated reason was especially puzzling because it appears to the Court  
that Plaintiff sought out Nurse Hancock-Lewis’ treatment most consistently. *See*  
ECF No. 12 at 3–8.

1 (quoting *Molina*, 674 F.3d at 1121). The more serious an ALJ's error, the more  
2 difficult it is to show the error was harmless. *Id.* at 1173.

3 Ninth Circuit "precedents have been cautious about when harmless error  
4 should be found, even though the analytical framework itself applies broadly." *Id.*  
5 at 1170. "[A] reviewing court cannot consider [an] error harmless unless it can  
6 confidently conclude that no reasonable ALJ, when fully crediting the testimony,  
7 could have reached a different disability determination." *Stout v. Comm'r, Soc.*  
8 *Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th Cir. 2006). Accordingly, the Court  
9 must consider whether the ALJ's error was "'inconsequential to the ultimate  
10 nondisability determination' in the context of the record as a whole." *Molina*, 674  
11 F.3d at 1122 (quoting *Carmickle*, 533 F.3d at 1162).

12 Here, the Court cannot confidently conclude that no reasonable ALJ, when  
13 fully crediting Nurse Hancock-Lewis' testimony, could have reached a different  
14 disability determination. As already noted, a treating source's medical opinion is  
15 given more weight than that of a nontreating source. While a large portion of  
16 Nurse Hancock-Lewis' treatment records notate Plaintiff's subjective reports of  
17 his own symptoms, the ALJ must still properly consider her opinion using the  
18 requirements of 20 C.F.R. sections 404.1527 and 416.927. By failing to do so, the  
19 ALJ erred.

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2 **C. Vocational Expert Testimony**

3 Lastly, the Commissioner argues that the ALJ's hypothetical question to the  
4 vocational expert based on the limitations he identified, and the ALJ's subsequent  
5 reliance on the expert's testimony, was proper. ECF No. 13 at 6–7. Plaintiff  
6 argues that the hypothetical question was incomplete and therefore, the ALJ's  
7 reliance on the expert's testimony was improper. ECF No. 12 at 18–19. The Court  
8 agrees with Plaintiff.

9 When an ALJ poses a hypothetical question to the vocational expert that  
10 contains all the limitations that the ALJ found credible and supported by  
11 substantial evidence, reliance on the expert's testimony is proper. *See Bayliss*, 427  
12 F.3d at 1217. Through the vocational expert's testimony, the ALJ can meet his  
13 burden to identify specific jobs existing in substantial numbers that the claimant  
14 can perform. *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th  
15 Cir. 2010).

16 Here, remand is appropriate in light of the Court's conclusion that the ALJ  
17 failed to properly weigh Nurse Hancock-Lewis' opinion, which may affect the  
18 ALJ's limitations findings. Because the ALJ's hypothetical question was  
19 incomplete, the ALJ erred.

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3 **V. CONCLUSION**

4 For the foregoing reasons, the Court reverses and remands for further  
5 proceedings. On remand, the ALJ may further develop the impact, if any, of  
6 Plaintiff's drug and alcohol use on his limitations and alleged memory loss.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 **1.** Defendant's Motion for Summary Judgment, **ECF No. 13**, is  
9 **DENIED.**

10 **2.** Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is  
11 **GRANTED.**

12 **3.** The Clerk's Office is directed to **ENTER JUDGMENT** in favor of  
13 Plaintiff.

14 **4.** The Court **REVERSES AND REMANDS** the matter to the  
15 Commissioner of the Social Security Administration.

16 **5.** All pending motions are **DENIED AS MOOT.**

17 **6.** All hearings and other deadlines are **STRICKEN.**

18 **7.** The Clerk's Office is directed to **CLOSE** this file.

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1       **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order  
2 and provide copies to all counsel.

3       **DATED** this 27<sup>th</sup> day of August 2018.

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6       SALVADOR MENDOZA, JR.  
7       United States District Judge  
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